

Tentative Rulings for October 25, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG00838 *Pierre Estalin Saint-Fleur v. County of Fresno* (Dept. 502)

14CECG01391 *Rodriguez v. Salazar* (Dept. 403)

14CECG03881 *Bourne v. Tubbs* (Dept. 403)

16CECG02082 *Cutler v. Coehlo* (Dept. 403)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG02711 *Harpains Meadow, L.P. v. Stockbridge* is continued to Thursday, November 17, 2016, at 3:30 p.m. in Dept. 501.

15CECG01191 *The State of California v. Ross Family Properties, LLC* is continued to Thursday, October 27, 2016 at 3:30 p.m. in Dept. 403.

15CECG01448 *2012-1 CRE Venture, LLC v. Linmar-Shaw, LLC* is continued to Tuesday, November 15, 2016, at 3:30 p.m. in Dept. 502.

15CECG02741 *Capriola v. Expressed Services, Inc.* is continued to Tuesday, November 1st, 2016 at 3:30pm in Dept. 403.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: **Coelho v. Coelho**
Case No. 15 CE CG 00543

Hearing Date: October 25th, 2016 (Dept. 402)

Motion: Petitioners' Motion for Order in Aid of Arbitration #2

Tentative Ruling:

To deny petitioners' motion for order in aid of arbitration. There is no need for this court to make an order confirming the arbitrator's decision, which is valid and binding on the parties. There is also no need for an order compelling respondents to participate in the arbitration, as the court has already compelled the parties to attend arbitration.

Explanation:

The present motion is essentially a request for an order ratifying the arbitrator's decision to deny the respondent's request for disqualification. However, petitioners have already brought a motion for an order in aid of arbitration which sought the court's determination of the same issue, and the court has ruled that it has no power to decide the question of whether the arbitrator should be disqualified.

In its order on the previous motion, the court stated, "there is no legal authority for this Court to rule on the timeliness or propriety of the disqualification notice. Again, that is for the arbitrator to decide in the first instance." (Court's Tentative Ruling of November 19th, 2015, pp. 1-2.) The court went on to state that "There is no basis for this Court to rule on the notice of disqualification directed to the [sic.] Mr. Gilles. The Court therefore denies the motion for orders in 'aid of arbitration.'" (*Id.* at p. 2.)

Thus, the court has already ruled that it has no power to rule on the issue raised by the present motion, namely whether the notice of disqualification is valid or timely. Instead, the court found that the arbitrator needed to rule on the disqualification's validity. Now that the arbitrator has made his ruling, there is no need for this court to make another order confirming the arbitrator's decision, which is valid and binding on the parties.

While the court's order made a reference to the arbitrator ruling on the disqualification "in the first instance", this language was merely intended to indicate that the court might need to review the arbitrator's decision later, at the conclusion of the arbitration proceedings, when the parties would presumably bring a petition to confirm, correct, or vacate the award. However, it would be premature for the court to rule on the validity of the arbitrator's interim order on the notice of disqualification at

this time, when the arbitrator has not yet made a final decision on the merits of the underlying case.

Likewise, the court's statement that the decision is "without prejudice to any other petitions that may arise upon the arbitrator's ruling on the notice of disqualification" was intended to refer to other disputes that might arise on different issues, not an invitation for the parties to seek an order confirming the correctness of the arbitrator's decision on the disqualification issue. For example, if the arbitrator had disqualified himself in response to the respondent's request, then the parties would have needed to bring a petition to appoint a new arbitrator and the court would have had jurisdiction to rule on the petition. However, the court was not instructing or inviting the parties to bring yet another motion for an order to ratify or approve the arbitrator's decision denying the disqualification request. Again, the arbitrator was the only person with power to rule on the disqualification issue, and he has already made his ruling, which is final and binding on the parties.

The arbitrator may have been confused about the nature of the court's previous order, as his decision states that it is a "a first-instance determination, as ordered by the Fresno County Superior Court" and that, "pending review by the Superior Court, the Arbitrator retains jurisdiction to hear and resolve all issues pending in this matter." (August 25th, 2016 Order of Arbitrator Re: Notice of Disqualification, p. 1.) This language seems to imply that the arbitrator may have believed that the court needed to review and approve his order before it became final and binding.

However, no such order from this court should be necessary here, as the arbitrator has full authority and power to make interim orders needed to move forward with the arbitration. The court retains only vestigial jurisdiction over the case once the petition to compel arbitration has been granted. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796.) While the court does have jurisdiction to resolve some disputes regarding the matter after it has been sent to arbitration (Code Civ. Proc. § 1292.6), here there has been no challenge to the arbitrator's decision on the notice of disqualification, and therefore there is no need for the court to make a further order regarding the validity of the arbitrator's decision.

The court also has the power to make certain orders where there have been unreasonable delays in the arbitration. (*Bosworth v. Whitmore* (2006) 135 Cal.App.4th 536, 548-550.) Here, however, there is no evidence that there has been an unreasonable delay in the arbitration proceedings that would warrant the court's intervention. While petitioners complain that respondents have obstructed the arbitration process, they do not submit any evidence that the arbitration has been unreasonably delayed as a result of respondents' tactics. Thus, it is not necessary for the court to take the unusual step of intervening in the arbitration proceedings to break up the "logjam."

Also, although petitioners seek an order requiring respondents to proceed with the arbitration because respondents have refused to appear before the arbitrator, it does not appear that there is any need for such an order. First, the court has already granted an order compelling the parties to attend the arbitration, so it would be

Therefore, the court intends to deny the motion for an order compelling respondents to participate in the arbitration. The court also intends to deny the order ratifying the arbitrator's order denying the disqualification request, as no such order is necessary.

Tentative Ruling

Issued By: JYH on 10/24/16
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Maria Barbosa Avila, et al. v. Tos Farms, Inc., et al.***
Superior Court Case No. 16CECG00086

Hearing Date: October 25, 2016 (Dept. 402)

Motions: Defendants Four Warns Corporation and Numark Transportation, Inc.'s motion to strike

Tentative Ruling:

To deny.

Explanation:

To survive a motion to strike punitive damages, ultimate facts showing entitlement to such relief must be pleaded by plaintiff. (*Blegen v. Superior Court* (1981) 125 Cal. App. 3d 959, 962–963; *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.2d 22, 29.) The court reads the allegations in the complaint as a whole, and assumes the truth of the matters alleged. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

Punitive damages for a non-intentional act are permitted where reckless indifference is shown. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 898.) To establish malice on the basis of a conscious disregard of the safety of others, plaintiff must show that defendant was aware of the probable dangerous consequences of his or her conduct, and then “willfully and deliberately failed to avoid those consequences. [Citation.]” (*Taylor*, supra, 24 Cal.3d at pp. 895-896.)

In the case at bar, Defendants Four Warns Corporation and Numark Transportation, Inc. (“Defendants”) move to strike Plaintiffs’ punitive damages allegations in the third amended complaint on the ground that the allegations are insufficient as a matter of law.

Plaintiffs’ third amended complaint alleges that Defendants negligently, carelessly and recklessly, and with gross negligence owned, operated, maintained and negligently entrusted the Freightliner truck that was involved in the accident, directly and proximately causing Plaintiffs’ injuries and damages. Specifically, Plaintiffs allege that Defendants knew that the truck in fact had inoperable brakes, brake systems, and safety lights.

Clearly, a Freightliner truck with inoperative brakes traversing a highway is dangerous. Plaintiffs here allege that Defendants knew the Freightliner’s brakes were inoperative, yet still allowed the vehicle to be driven. This is sufficient to establish Defendant’s conscious disregard for the safety of the motoring public. Plaintiffs thus have alleged sufficient facts showing Defendants’ awareness of a probable dangerous consequence and a deliberate failure to avoid this danger by simply having the brakes

repaired. Plaintiffs have sufficiently set forth a basis upon which punitive damages may properly be requested. Accordingly, Defendants' motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH **on** 10/24/16
 (Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***State of California v. Eldon and Yukari Thiesen Properties, LLC, et al.***
Court Case No. 16 CECG 01446

Hearing Date: October 25, 2016 (Dept. 402)

Motion: State of California's Motion for Order of Possession

Tentative Ruling:

To deny without prejudice.

Explanation:

Code of Civil Procedure 1240.010 authorizes the State to take property for a "public use." Procedurally, the motion shall describe the property to be acquired, which description may be made by reference to the complaint and shall state the date after which the plaintiff is authorized to take possession of the property." (Code Civ. Proc., § 1255.460.) The motion references the property by the descriptions provided in the complaint and requests possession as of October 24, 2016.

"If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service of the notice of motion shall be made not less than 90 days prior to the hearing on the motion." (Code Civ. Proc. § 1255.410, subd (b).) Service has been made on all defendants who have not defaulted or filed a disclaimer of interest (i.e., just defendant Eldon and Yukari Thiesen Properties, LLC) and the hearing date is more than 90 days after service.

Code of Civil Procedure section 1255.410, subdivision (a), provides in relevant part:

The motion shall include a statement substantially in the following form:
"You have the right to oppose this motion for an order of possession of your property. If you oppose this motion you must serve the plaintiff and file with the court a written opposition to the motion within 30 days from the date you were served with this motion." If the written opposition asserts a hardship, it shall be supported by a declaration signed under penalty of perjury stating facts supporting the hardship.

Here, the state has included the quoted language about the timing of filing the opposition (Notice of Motion at 2:5-9.), but not the unquoted language about how to assert a hardship. Accordingly the Notice is defective and the Motion must be denied even though the Motion is unopposed. The purpose of subdivision (a) is to explain to the record owner of the property and its occupants how to oppose the motion. If the non-quoted statement is not included, i.e., that the written objections must be supported by a declaration signed under penalty of perjury stating facts supporting the hardship, that goal is not furthered. Moreover, the requirement that the written opposition asserting a hardship be supported by a signed declaration under penalty of

perjury stating facts supporting the hardship appears again verbatim in subdivision (c), which is the subdivision that describes the procedure to oppose a motion for order of possession. Accordingly, the only way to interpret the language in subdivision (a) as more than mere surplusage is to read it as an additional requirement of the Notice of Motion. (*Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1387 ["A construction making some words surplusage is to be avoided."].)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/24/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(20)

Tentative Ruling

Re: **Castaneda v. Westco Equities, Inc.**, Superior Court Case No. 14CECG02471

Hearing Date: **October 25, 2016 (Dept. 403)**

Motion: Petition to Compel Arbitration Award
Petition to Vacate Arbitration Award

Tentative Ruling:

To grant the petition to confirm taken under advisement on 10/20/16, and sign the proposed order confirming defendant Westco Equities, Inc.'s petition to confirm arbitration award. To deny the petition to vacate the arbitration award.

Explanation:

Code of Civil Procedure section 1285.4 requires that a petition to confirm an arbitration award set forth: (a) the substance or have attached a copy of the agreement to arbitrate unless the petitioner denies the existence of such an agreement; (b) the names of the arbitrators; and (c) set forth or have attached a copy of the award and the written opinion of the arbitrators, if any.

Westco complies with these requirements. Thus, unless respondent timely moves to vacate, correct or dismiss the petition, the court must confirm the arbitration award and enter judgment thereon. (Code Civ. Proc. §§ 1286; 1287.4; *Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 744-45.)

If the trial court does not dismiss the petition to correct or vacate an award and also does not dismiss the petition, "it must confirm the award." (See *Law Offices of David S. Karton v. Segreto* (2009) 176 Cal.App.4th 1, 9-10.)

Castaneda seeks to vacate the award, but his petition is untimely.

On 8/23/16 Westco filed and served by mail the petition to confirm. The hearing was initially set for 9/29/16. On 9/13/16 Westco filed an amended notice changing the hearing date to 10/20/16.

If a petition to confirm the award is filed within the 100-day period, any response seeking to vacate or correct the award must be filed within the period for responses generally (10 days after service of the petition; Code Civ. Proc. § 1290.6). (*DeMello v. Souza* (1973) 36 Cal.App.3d 79, 83.) If a petition to confirm an award is filed after the 100-day time limit, a response to the petition that asserts grounds to vacate the award

must be disregarded. (*Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 742.)

The time to move to vacate the award runs from the filing of the award, not the hearing date. Accordingly, the amended notice of petition did not alter the deadline for filing a response or petition to vacate, which was 9/7/16. The response and petition to vacate were filed on 9/15/16, clearly untimely.

Unless a petition to correct or vacate the award has been timely filed, the court must render a judgment confirming the arbitrator's award. (See Code Civ. Proc. § 1286 ["the court shall confirm the award as made ..."; see also *Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.* (1994) 25 Cal.App.4th 809, 818 [no authority to alter terms of award absent petition to correct].)

Plaintiff Castaneda requests relief pursuant to Code of Civil Procedure section 473.

Plaintiff's counsel did not file an attorney affidavit of fault (in which case relief would be mandatory, and accordingly must show "mistake, inadvertence, surprise or 'excusable neglect,'" in which event relief is discretionary. (Code Civ. Proc. § 473(b).) No discretionary relief can be granted where there is no showing of "mistake, inadvertence, surprise or excusable neglect." (See *Lorenz v. Commercial Accept. Ins. Co.* (1995) 40 Cal.App.4th 981, 989.)

"Ignorance of the law, at least where coupled with negligence in failing to look it up, will not justify a trial court in granting relief [citations], and such facts will certainly sustain a finding denying relief. [Citations.]" (*Security Truck Line v. City of Monterey* (1953) 117 Cal.App.2d 441, 445.) The appellate court in *Coordinated Const., Inc. v. J. M. Arnoff Co.* (1965) 238 Cal.App.2d 313, 319, where counsel missed the 10-day limitation of section 1290.6, cited *Security Truck Line* in approving the trial court's denial of relief under section 473 where the attorney was ignorant of the law and was negligent in researching it as he failed to consider the applicable section. This is essentially the same circumstance, and for that reason relief from failure to meet the 10-day deadline will be denied.

The petition to vacate would also be denied on the merits. Plaintiff contends that there are grounds to vacate pursuant to the following provisions of Code of Civil Procedure section 1286.2:

(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:

(3) The rights of the party were substantially prejudiced by **misconduct** of a neutral arbitrator.

(4) The arbitrators **exceeded their powers** and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(5) The rights of the party were substantially prejudiced by the **refusal of the arbitrators to postpone the hearing** upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground **for disqualification** of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision.

(Emphasis added.)

Other than a single citation to 1286.2(a)(3), (4), (5) and (6), the plaintiff cites to no relevant authority and discusses no case law to show that the facts raised are sufficient to vacate the award.

Other than the unsubstantiated assertion by counsel that the arbitrator was biased against plaintiff, plaintiff does not clearly identify any conduct that he contends constitutes misconduct by the arbitrator. Plaintiff apparently contends that grounds for disqualification existed because the arbitrator had a financial interest in the properties. However, no admissible evidence of such an interest is submitted. Accordingly, plaintiff has not shown that he was substantially prejudiced by misconduct by the arbitrator, or that grounds for disqualification existed.

Plaintiff continues to argue that Judge Broadman did not have jurisdiction or authority to hear the arbitration between Castaneda and Westco. Plaintiff made a motion raising the issue (Glickfeld Dec. Exh. A), and the motion was denied. This court had already ruled that those claims are arbitrable, and ordered petition to arbitration. Judge Broadman oversaw the arbitration hearing on plaintiff's breach of contract action and ruled in favor of Westco. Plaintiff fails to show what Broadman did that was beyond the scope of his authority.

Plaintiff contends that the award should be vacated due to the refusal of the arbitrator to postpone the hearing. He argues that because of this he could not put on an expert accountant or produce evidence regarding the condition of the property. However, the moving papers do not show that plaintiff was diligent in pursuing this discovery, and fails to clearly show how he was prejudiced by the denial of the request to postpone the hearing.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 10/24/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

(6)

Tentative Ruling

Re: ***Fleck v. Longitude Logistics, LLC***
Superior Court Case No.: 16CECG01803

Hearing Date: October 25, 2016 (**Dept. 501**)

Motion: By Defendants Longitude Logistics, LLC, and Brian Franco, to transfer action to Orange County

Tentative Ruling:

To grant, with Plaintiffs to effectuate the transfer to Orange County, pursuant to Code of Civil Procedure section 399.

Explanation:

The Court notes at the outset that there is no evidence that the motion is untimely, because no proof of service of the summons and complaint has been filed, and no evidence in the opposition, states when Defendants Longitude Logistics, LLC, and Brian Franco ("Defendants"), were served. (*Honningan v. Boren* (1966) 243 Cal.App.2d 810, 816.) Further, Plaintiffs Shannon & Sheri Fleck dba D.F. & Associates' ("Plaintiffs") opposition on the merits of the motion waives any defects in notice. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7.)

"Except as otherwise provided by law and subject to the power of the court to transfer ... the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." (Code Civ. Proc., § 395, subd. (a); *Brown v. Superior Court* (1984) 37 Cal.3d 477, 483.)

"Subject to subdivision (b) [court's power to transfer], if a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary." (Code Civ. Proc., § 395, subd. (a).)

The place of making a contract for venue purposes is the place where the last act necessary for validity of the contract is performed. (*Braunstein v. Superior Court* (1964) 225 Cal.App.2d 691.)

In order to bring an action on a contract in the county where the contract obligation is to be performed, if different from where it was incurred, there must be a written contract that the obligation is to be performed in a county other than the county where it was incurred and such contract cannot be implied. (*Causley v. Superior Court* (1968) 267 Cal.App.2d 757.)

In *Honningan v. Boren* (1966) 243 Cal.App.2d 810, 812-813, cited by Plaintiffs, a defendant filed a notice of motion for change of venue, but failed to file a demurrer or answer simultaneously with the filing of the motion for change of venue, as then required by Code of Civil Procedure section 396b. The motion for change of venue was continued for about two weeks, within which time the defendant answered. About a month afterwards, the motion for change of venue on grounds of "wrong court" was heard and denied because the defendant didn't comply with Code of Civil Procedure section 396b.

In November of 1963, the defendant moved for relief under Code of Civil Procedure section 473 because his attorney's secretary had been neglectful. This motion was also denied. In March of 1964 the defendant appealed from the order denying his motion to vacate the order denying the motion for change of venue. Also that month, the defendant petitioned the court of appeal for writ of mandate, seeking a change of venue, but mandate was denied based on untimeliness. Defendant petitioned the court of appeal for a writ of supersedeas, which was also denied. On the same date, the case was called for trial and defense counsel withdrew, indicating he would not proceed to trial as he did not intend to waive his client's rights concerning venue. Trial ensued, and judgment was rendered in plaintiff's favor in the amount of \$15,732.50. (*Honningan v. Boren, supra*, 243 Cal.App.2d 810, 813.)

On the point relevant here, the issue was whether the trial court abused its discretion in denying the motion to vacate the prior order denying the motion to change venue. While the failure to move for change of venue on the ground of residence at the time of demurrer or answer constituted a waiver of the right to change venue, the court was not determining whether or not the defendant had waived its right to do so, but whether the trial court correctly denied the motion for relief. (*Honningan v. Boren, supra*, 243 Cal.App.2d 810, 817.)

The issue in *K.R.I. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, also cited by Plaintiffs, was whether a plaintiff/cross defendant against whom a compulsory cross complaint had been filed could seek a change of venue under Code of Civil Procedure §396b based on a claim of improper venue as determined by reference to the cross complaint. The court of appeal said "no." (*Id.* at p. 494.) There is no cross complaint here, and the Plaintiffs are not seeking to transfer venue based on any compulsory cross complaint. As long as venue was proper as to one or more defendants in the original action, then the entire case could be tried in that county, regardless of whether venue would be improper concerning the cross defendants if the compulsory cross complaint were analyzed separately. (*Id.* at pp. 504-505.) That is all that case holds.

The other case cited by Plaintiffs, *Buran Equipment Co. v. Superior Court* (1987) 190 Cal.App.3d 1662, held that venue was correct in a lawsuit against a law firm and two of its general partners, who were named as individuals, where the county was filed in the county in which two of its general partners resided, and where the court found the joinder of the two individuals was not a sham. (*Id.* at pp. 1666-1667.)

Opinions are not authority for issues they do not consider. (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 539.)

Here, the evidence is that both Defendants are residents of Orange County. (Decl. of Karen Yehezkel, ¶13; Decl. of Brian Franco, ¶¶2-3.) The evidence is that the contract was entered into in Orange County, where it was last signed. (Decl. of Karen Yehezkel, ¶14, exhibit thereto.) There is no indication that there is a special contract in writing that the contract is to be performed in Fresno County.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/24/16
(Judge's initials) (Date)

Tentative Ruling

Re: ***California Planned Parenthood Education Fund v. Promesa Behavioral Health***

Case No. 16 CE CG 00543

Hearing Date: October 25th, 2016 (Dept. 501)

Motion: Plaintiffs' Motion to Seal Unredacted Declarations Submitted in Support of Motion for Preliminary Injunction

Plaintiff's Motion to File Applications for Appointment of Guardian Ad Litem Under Seal

Tentative Ruling:

To grant the plaintiffs' motions to seal the unredacted declarations in support of the motion for preliminary injunction, and the applications for guardians ad litem. (Cal. Rules of Court, Rule 2.550, subd. (d).)

Explanation:

"Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, Rule 2.550, subd. (c).) "A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, Rule 2.551, subd. (a).)

The court must make certain express findings in order to seal records. Specifically, the court must find that the facts establish:

- (1) There exists an overriding interest that overcomes the right of public access to the record;
- (2) The overriding interest supports sealing the record;
- (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exist to achieve the overriding interest. (Cal. Rules of Court, Rule 2.550, subd. (d).)

Also, "[a]n order sealing the record must: (A) Specifically state the facts that support the findings; and (B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the

material that needs to be placed under seal. All other portions of each document or page must be included in the public file." (Cal. Rules of Court, rule 2.550, subd. (e)(1)(A), (B).)

Here, the court finds that the minor plaintiffs have an overriding interest in their right to privacy, which necessitates protecting their identities from public disclosure and overcomes public interest in access to these records. The subject matter of this case addresses the minor plaintiffs' private sexual and reproductive health history, information and decisions, including their ability to keep that information private, and thus raises sensitive topics that deserve special protection. Plaintiffs EB. and V.R. bring claims that, as foster youth currently or previously placed in Defendant's group homes, defendant violated their constitutional privacy rights to access and use contraception, arbitrarily prohibited them from accessing reproductive and sexual health care confidentially, and punished them for trying to exercise these rights. These claims implicate highly personal information about plaintiffs' sexual and reproductive health history and choices. California law recognizes the importance of strong privacy protections for medical information and that litigants bringing cases involving their private health information should be given safeguards for their individual privacy. (See, e.g., Cal. Civ. Code § 3427.3.) In cases addressing reproductive rights and privacy issues, the "United States Supreme Court has also implicitly endorsed the use of pseudonyms to protect a plaintiff's privacy" and conceal their identities. (*Doe v. Lincoln Unified Sch. Dist.*, 115 Cal. Rptr. 3d 191, 197 (Cal. Ct. App. 2010) (citing *Roe v. Wade*, 410 US. 113 (1973); *Doe v. Bolton*, 410 US. 179 (1973); *Poe v. Ullman*, 367 US. 497 (1961)).)

The minor plaintiffs are also entitled to privacy protections because the sensitive subject matter at issue — including their private health information and child welfare system involvement — relates entirely to a time period in which they are minors. California courts recognize the importance of protecting the identities of minors in court proceedings. (See, e.g., Cal. Rules of Court, Rule 8.401 (permitting youth to use only their initials or first name and last initial "[t]o protect the anonymity of juveniles involved in juvenile court proceedings"); Edward W. Jessen, Cal. Style Manual §§ 59—10 (4th ed. 2000) (similar); *Christina C. v. County of Orange*, 220 Cal. Rptr. 3d 43, 45 n.1 (Cal. Ct. App. 2013) (using initials to refer to a minor in appellate proceedings in a civil rights case).)

The minor Plaintiffs' interest in protecting their identity supports sealing of the unredacted applications for appointment of guardians ad litem, and a substantial probability exists that this overriding interest will be prejudiced if the applications are not sealed. The unredacted applications contain the minor Plaintiffs' full names, addresses, telephone numbers, dates of birth, the names, addresses, and telephone numbers of their proposed guardians ad litem, and an explanation of their relationship with their proposed guardians ad litem. If these applications are not sealed, their identities will necessarily become public, as a member of the public could learn their names directly or use the other information contained therein to ascertain that information.

The court finds that the declarants' interest in protecting their identity supports sealing of the unredacted declarations, and a substantial probability exists that this overriding interest will be prejudiced if the unredacted declarations are not sealed. The

unredacted declarations contain their full names and, in some instances, their birth dates and the names of their minor children. If the unredacted declarations are not sealed, their identities will necessarily become public, as a member of the public could learn their names directly or use the other information contained therein to ascertain their names.

The court further finds that the requests to seal the applications for appointment of guardians ad litem and declarations in support of preliminary injunction are narrowly tailored to protect the minor plaintiffs' overriding interests, and no less restrictive means exist to achieve those interests. The requests are limited to only those portions of the applications and declarations that contain the full and true identities of the minor plaintiffs or that contain information that could identify the minor plaintiffs. Protecting this information from public disclosure is the only way to ensure that the minor plaintiffs' identities are kept confidential and private.

For all of the foregoing reasons, the court intends to seal the applications for appointment of guardians ad litem for minor Plaintiffs EB. and A.F., as well as the unredacted declarations of S.H., AZ, L.B., E.B., C.W., A.K., M.A., and S.M. submitted in support of the motion for preliminary injunction.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/24/16
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***Gonzalez et al. v. Mittie et al.***
Superior Court Case No. 15CECG01894

Hearing Date: October 25, 2016 (Dept. 501)

Motion: Petitions to Compromise Minors' Claims

Tentative Ruling:

To deny without prejudice. Once the matter is ready for compromise, petitioner must file amended petitions, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petitions. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

Each petition seeks an additional order regarding a potential lien by Optum on behalf of United Healthcare. Until the potential lien issue is resolved the minors' claims are not ready for compromise. Including a request for additional orders regarding entities who are not parties to the action is improper. If the petitioner seeks an order they need to file a proper notice motion. Of course the motion may only be sought against a party to an action. Further, the attachment that provides the alleged "authority" for the additional order fails to cite to any statutory authority to support the order sought.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS **on** 10/24/16
 (Judge's initials) (Date)

Tentative Rulings for Department 502

(28)

Tentative Ruling

Re: ***Kim v. LCN Ventures, LLC***

Case No. 12CECG02471

Hearing Date: October 25, 2016 (Dept. 502)

Motion: By Defendant for Summary Judgment

Tentative Ruling:

To deny the motion.

Explanation:

[As of October 20, 2016, no opposing separate statement by Plaintiff and no reply brief appears in the Court's files.]

Defendant Lance-Kashian & Co. contends that the judgment entered on January 14, 2016 on behalf of Defendant River Park VIII in this case is collateral estoppel against Plaintiff's pursuit of his claims against Defendant Lance-Kashian & Co. Defendant therefore moves for summary judgment on this ground.

To obtain summary judgment, "all a defendant needs to do is to show that the plaintiff cannot establish at least one element of the cause of action." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853. If a defendant makes this showing, the burden shifts to the plaintiff to demonstrate that one or more material facts exist as to the cause of action or as to a defense to a cause of action. (CCP § 437(c), subdivision(p)(2).)

In a summary judgment motion, the pleadings determine the scope of relevant issues. (*Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) A defendant need only "negate plaintiff's theories of liability as alleged in the complaint; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493 (emphasis in original).)

The court examines affidavits, declarations and deposition testimony as set forth by the parties, where applicable. (*DeSuza v. Andersack* (1976) 63 Cal.App.3d 694, 698.) Any doubts about the propriety of summary judgment are to be resolved in favor of the opposing party. (*Yanowitz v. L'Oreal USA, Inc.* (2003) 106 Cal.App.4th 1036, 1050.)

A court will “liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor.” (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

The elements for collateral estoppel are: “(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?” (*Columbus Line, Inc. v. Gray Line Sight-Seeing Companies, Associated, Inc.* (1981) 120 Cal.App.3d 622, 628.) An issue is actually litigated when “it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.” (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 148.) The “identical issue” requirement addresses whether “identical factual allegations” are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. (*Bostick v. Flex Equip. Co., Inc.* (2007) 147 Cal.App.4th 80, 97-98.)

Moreover, although not addressed by the parties, even if all the traditional elements of collateral estoppel are met, courts still look “to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting.” *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1049 (*quoting Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342-43.) “[T]he public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy.” (*Lucido, supra*, 51 Cal.3d at 343.)

Collateral estoppel will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed. (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90.)

In this case, it does appear that the elements of collateral estoppel have been met. First, the factual issues underlying the two motions are identical- the proposed undisputed facts are identical. In the prior motion, the Court found that, because Defendant River Park VII produced uncontradicted evidence a reasonable person would have determined that the lack of safety equipment was apparent by reasonable inspection and that, therefore, Defendant River Park VII was not liable. In the motion brought by Lance-Kashian & Co., this contention was, in effect, contested, and Plaintiff brought forward admissible evidence that created a question of fact as to whether a duty was owed to Plaintiff. However, the issue was “determined” in the prior motion, and, as such, is identical in nature.

Second, there was a final judgment on the merits: judgment was entered on January 14, 2016 and a Notice was filed with the Court on January 22, 2016. The judgment is therefore final.

Third, the issue is asserted against the same party against whom the issue was already litigated.

Therefore, the elements of collateral estoppel are met.

Nevertheless, it appears in this case that the interests of justice would compel denying collateral estoppel here: had the declarations been provided in the previous case, it is fairly certain that the previous motion would have been denied as well. In other words, it would be unfair to deny Plaintiff his day in court because of the unexplained failure of his counsel to file an opposition to the prior motion for summary judgment. On this ground, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on** 10/21/16
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Gonzalez et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG00134
Alonzo et al. v. Vemma Nutrition Company et al.
Case No. 14CECG01023
Martinez v. Vemma Nutrition Co. et al.
Case No. 14CECG01715
Smith v. Union Pacific Railroad et al.
Case No. 14CECG02314

Hearing Date: **October 25, 2016 (Dept. 502)**

Motion: Plaintiffs' Motion to Compel Production of Recorded Witness Interview

Tentative Ruling:

To grant. (Code Civ. Proc. § 2031.310.) Within five days of service of the order by the clerk, Vemma Nutrition Company shall produce the recording of the February 4, 2014 interview of Elena Olveda.

Explanation:

Initially, the court notes that the motion is timely. It would have been untimely had plaintiffs moved to compel production pursuant to the discovery responses served on June 30, 2014. But in April of this year plaintiffs served supplemental interrogatories and inspection demands, to which Vemma responded with new information that it did not provide in its earlier responses. The motion is clearly timely as to these supplemental responses.

Plaintiffs move to compel Vemma to produce the recorded interview of Elena Olveda taken on February 4, 2014. Vemma objects on grounds of attorney work product.

"A writing that reflects an attorney's impressions, conclusions, opinions or legal research or theories is not discoverable under any circumstances." (Code Civ. Proc. § 2018.030(a).) "Writing" is broadly defined by the Discovery Act to include any recorded information. (Code Civ. Proc. § 2016.020(c); Evid. Code § 250.)

"[A] witness statement obtained through an attorney-directed interview is entitled as a matter of law to at least qualified work product protection." (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 499.) "[A]n objecting party may be entitled to protection **if** it can make a **preliminary or foundational showing** that answering the interrogatory [12.3] would reveal the attorney's tactics, impressions, or evaluation of the case, or would result in opposing counsel taking undue advantage of the attorney's industry or efforts. **Upon such a showing**, the trial court should then determine, by making an in camera inspection if necessary, whether absolute or qualified work

product protection applies to the material in dispute." (*Coito, supra*, 54 Cal.4th at p. 502.)

In this case, Vemma fails to make this foundational showing. Vemma claims in the memorandum of points and authorities that "Ms. Olveda's recorded interview was taken by Mr. Scott, a private investigator, in anticipation of litigation at the behest of defense counsel with the intention that said interview be provided to defense counsel." (Oppo. 8:9-11.) However, this representation is tellingly absent from the declaration of Christina Morovati in support of the opposition. The bald representation in the memorandum, unsupported by any evidence, that the interview was taken at the behest of counsel is insufficient. In law and motion practice, factual evidence is supplied to the court by way of declarations. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224.) Courts must disregard facts stated in unverified memo of points and authorities, unless supported by reference to evidence presented in declarations or otherwise. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578.) The opposition provides no information about how or why the interview was procured, or who conducted the interview.

In fact, the moving papers point out that Ms. Olveda testified at her deposition that she only spoke with the investigator/process server who served her deposition notice. (Stirrup Dec. ¶ 5.) *Coito* recognized that "witness statements procured by an attorney [may not] always reveal the attorney's thought process ..." (*Coito, supra*, p. 495.) If it was merely a process server, as opposed to an investigator hired to ask specific questions at the behest of counsel, then it seems less likely that any attorney brain work would be revealed.

Since Vemma failed to make its preliminary foundational showing, the motion will be granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on** 10/21/16
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: ***Ferguson v. City of Fresno***
Case No. 14CECG00107
Hearing Date: October 25, 2016 (Dept. 502)
Motion: By Plaintiff for "Trial Preference"

Tentative Ruling:

To take the motion off calendar.

Explanation:

This case was dismissed on February 5, 2016 pursuant to a settlement agreement between the parties.

Although Plaintiff has scheduled a motion for "Trial Preference" he has filed no papers and, even if had, the Court would almost certainly be without jurisdiction to hear any such motion. (*Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1007 (dismissal with prejudice deprived superior court of jurisdiction)).

Therefore, the motion is taken off calendar.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 10/24/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

(30)

Tentative Ruling

Re: ***Edna Belanger v. Clovis Glass Co., Inc.***
Superior Court No. 15CECG02639

Hearing Date: Tuesday, October 25, 2016 (**Dept. 503**)

Motion: Plaintiff's Motion to Compel deposition with production of documents

Tentative Ruling:

To **Grant** Plaintiff's motion to compel deposition with production of documents, to occur on a mutually agreeable date.

To **Deny** Plaintiff's request for sanctions.

Explanation:

When a notice of deposition served on an entity describes the matters on which questions will be asked "with reasonable particularity," the entity is under a *duty to designate and produce* the officers, directors, managing agents or employees "most qualified" to testify on its behalf having knowledge of such matters. (Code Civ. Proc., § 2025.230.) The person or persons designated by the entity must testify "to the extent of any information known or reasonably available to the deponent." (*Ibid* [emphasis added].) Moreover, when a request for documents is made, the witness or someone in authority "is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." (*Maldonado v. Sup.Ct. [ICG Telecom Group, Inc.]* (2002) 94 Cal.App.4th 1390, 1396 [emphasis added].) The purpose of this provision is to eliminate the problem of trying to find out who in the corporate hierarchy has the information the examiner is seeking. Under former law, the entity was required only to designate "one or more" officers or employees to testify on its behalf. This permitted considerable "buck-passing" and "I don't know" answers at deposition. (*Maldonado, supra*, 94 Cal.App.4th 1390 at p.1395.)

Here, Plaintiff seeks to depose Mr. Bouchard, who Defendant concedes is the "most knowledgeable." (Buttry Dec, filed 10/11/16 ¶ 13.) Therefore, Defendant must comply with Plaintiff's requests, within the scope of the Civil Discovery Act.

Motion to Compel

According to the Civil Discovery Act, a party is entitled to discovery regarding any matter not privileged that is relevant to the pending action, if the matter either is itself admissible or appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.010; *Emerson Electric Co. v. Superior Court* (1997) 16 Cal. 4th 1101, 1108; *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 1276–1277.) Code of Civil Procedure section 2025.450,

subd. (a) provides for a motion to compel where the responding party fails to comply with proper discovery requests for deposition(s) and production of related documents.

Relevancy

The relevancy of the subject matter criterion is a broader concept than relevancy to the issues. (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 172; *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 492; *Children's Hospital, supra*, 226 Cal.App.4th at pp. 1276-1277.) Information is relevant for discovery purposes if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546; *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 712.) In addition, because all issues and argument that will come to light at trial often cannot be ascertained at a time when discovery is sought, courts may appropriately give the applicant substantial leeway. (*Tatkin v. Superior Court* (1958) 160 Cal.App.2d 745, 752—765.) In sum, the relevance of the subject matter standard must be applied liberally. "The scope of examination should not be limited unless the information sought is clearly privileged or irrelevant, and inquiry should not be limited to matter relevant only to the precise issues presented by the pleadings." (*Beverly Hills Nat. Bank & Trust Co. v. Superior Court* (1961) 195 Cal.App.2d 861, 865.) Doubts as to relevance should generally be resolved in favor of permitting discovery (*Pacific Tel., supra*, 2 Cal.3d at p. 173; *Chapin v. Superior Court* (1966) 239 Cal.App.2d 851, 855—859, 49 Cal.Rptr. 199). And contrary to popular belief, "fishing expeditions" are even permissible as long as the information sought might reasonably assist a party in litigation. (*Cruz v. Superior Court* (2004) 121 Cal.App.4th 646, 653.)

Here, Plaintiff properly seeks to depose witnesses who are knowledgeable about the fence that Defendant erected and to obtain documents relating to the installation of the fence. (Memo, filed 9/23/16 p3 lns 4-7.) This information directly relates to Plaintiff's claim because the fence encompasses the concrete that Plaintiff tripped on. But even if it didn't, inquiry is not limited to matter relevant only to the precise issues presented by the pleadings.

Admissibility

In deciding whether a matter appears reasonably calculated to lead to discovery of admissible evidence, The Court only attempts to foresee whether it is possible information in a particular subject area could be relevant or admissible at the time of trial. (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1397.) Ultimately, the scope of permissible discovery is one of reason, logic, and common sense. (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612.) But the standard is applied liberally, with any doubt generally resolved in favor of permitting discovery. (*Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 790.) And as with the issue of relevance, "fishing expeditions" may be permissible. (*Garamendi, supra*, 116 Cal.App.4th at p. 712.)

Here, all that must be established is that the information sought could be relevant at the time of trial. And relevance has already been established. Further, it is of no effect whether the matter itself is inadmissible. (Code Civ. Proc., § 2017.010; *Emerson Electric,*

supra, 16 Cal. 4th at p. 1108; *Children's Hospital Central California, supra*, 226 Cal.App.4th at pp. 1276–1277.)

For the foregoing reasons, motion to compel is GRANTED.

Sanctions

Failure to comply with a proper discovery request is considered a “misuse of the discovery process.” (Code Civ. Proc., § 2023.010, subds. (d) and (f).) And sanctions may be imposed for any “misuse” in connection with depositions. Sanctions can be imposed against the deponent or the party with whom the deponent is “affiliated” (as an officer, director, managing agent or employee). (Codes Civ. Proc., §§ 2025.450, subd. (g)(1); 2025.480, subd. (j).) Further, the court shall impose sanctions against the party opposing the motion to compel *unless* it finds that party acted “with substantial justification” or other circumstances render the sanction “unjust.” (*Ibid.*)

A request for a sanction shall, **in the notice of motion**, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. (Code Civ. Proc., § 2023.040; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 5-6.) It is *not* enough simply to attach declarations or a transcript showing that the deponent refused to appear or answer questions on counsel's advice. (*Blumenthal v. Sup.Ct. (Corey)* (1980) 103 Cal.App.3d 317, 320; *Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1075-1076—issue may be raised for first time on appeal because prior notice of imposition of sanctions is mandated by due process].)

Here, Defendant admits to not complying with Plaintiff's request. (Buttry Dec. filed 10/11/16, ¶ 14.) And Defendant submits no convincing opposition or compelling justification. Therefore, sanctions would be appropriate if they had been properly requested. But here, Plaintiff's notice does not include a request for sanctions. (Notice of Motion, filed 9/23/16.) And requesting sanctions via memorandum (Memo, filed 9/23/16, ¶ II (5)) does not comply with due process. Plaintiff's request for sanctions is denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 10/24/16
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: ***Calaveras Materials, Inc. v. Diablo Contractors, Inc., et al.***

Case No. 15CECG03129

Hearing Date: October 25, 2016 (Dept. 503)

Motion: By Defendant Diablo Contractors "to Compel Arbitration (Per Code of Civil Procedure §1281.2)" with Plaintiff Calaveras Materials, Inc.

Tentative Ruling:

To deny the motion.

Explanation:

Generally, "although 'the law favors contracts for arbitration between parties' 'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate.'" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744, quoting *Player v. Geo. M. Brewster & Son, Inc.* (1971) 18 Cal.App.3d 526, 534; *Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353.)

Determination of whether the parties agreed to arbitrate is a threshold issue that the trial court is required to make. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1364.) An agreement to arbitrate may be set forth in a secondary document incorporated into the parties' basic contract. (*King v. Larsen Realty, Inc.* (1981) 121 Cal.App.3d 349, 353.) Such incorporation must be "clear and unequivocal" and, "the terms of the incorporated document must be known or easily available to the contracting parties." (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 641, quoting *Williams Constr. Co. v. Standard-Pacific Corp.* (1967) 254 Cal.App.2d 442, 454.)

The burden is on the party petitioning to compel arbitration to establish the existence of an agreement to arbitrate. (*Engalia v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; *Banner Entertainment, Inc. v. Superior Court (Alchemy Filmworks, Inc.)* (1998) 62 Cal.App.4th 348, 356-357.) The court is required to weigh, "all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination on the issue of arbitrability." (*Banner Entertainment, supra*, 62 Cal.App.4th at 356-357.)

On February 9, 2016, this Court ruled on Defendant Diablo's prior petition to compel arbitration as follows:

In the present case, Diablo neither attached nor specifically referenced the portion of the prime contract allegedly incorporating the arbitration provisions set forth in the Standard Specifications. Essentially, Diablo's petition cites directly to the Standard Specifications without addressing whether such document was sufficiently incorporated into the prime contract. Accordingly, without attaching, or at least setting forth the incorporating provisions of the prime contract, the petition does not satisfy the threshold burden of establishing the existence of an agreement to arbitrate. (*Engalia, supra*, 15 Cal.4th at 972; *Banner Entertainment, supra*, 62 Cal.App.4th at 356-357.)

Similarly, unlike *Slaughter v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, here there is no agreement to arbitrate specifically between Diablo and Calaveras. Essentially, the reasonable interpretation of the provisions of SECTION 17 in the purchase order is that Calaveras agreed to participate in arbitration only "in the event" the Contractor and Owner chose arbitration to resolve a dispute. Consequently, it does not appear that SECTION 17 would apply unless there was an ongoing arbitration between Diablo and Caltrans.

Diablo's "Renewed Motion" to compel arbitration focuses on this second paragraph, but ignores the prior paragraph.

In denying the prior Petition, this Court did not express an opinion on the arbitrability of the dispute in front of it, merely that (1) Diablo had not met its burden to show an agreement to arbitrate, because it had not provided the portions of the prime contract which incorporated the "Standard Specifications," and (2) that the only documentation in front of the court was also insufficient and inapplicable. The Court denied the motion outright, and Diablo did not apparently request that the denial be without prejudice.

In this Motion, Diablo provides additional documentation and asks the Court, essentially, to find that there do exist agreements between the parties that would compel Calaveras to join the now-pending arbitration between Caltrans and Diablo.

Code of Civil Procedure §1008 states that any request for reconsideration must be based on "new or different facts, circumstances, or law." (Code Civ.Proc. §1008, subd.(a).) Further, such a motion must be made within ten days after service of notice of entry of the order. (Code Civ.Proc. §1008, subd.(a).) The nature of a motion is determined by the relief sought. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193.) Here, Diablo seeks to do what it failed to do in the prior motion, which is to carry its burden to show the existence of a contract to arbitrate between the parties. As such, the renewed motion to compel arbitration is a motion for reconsideration. Because the motion to reconsideration is not consistent with the requirements of Section 1008.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 10/24/16
(Judge's initials) (Date)